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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1924

No. 126

In the Matter of GEO. W. COWEN CO., INC., Bankrupt.

A. L. MAY, as Trustee in Bankruptcy of GEO. W. COWEN CO., INC. (a corporation), Bankrupt,

Petitioner,

vs.

J. M. HENDERSON, JR., and T. J. SCANNELL,

Respondents.

BRIEF FOR PETITIONER.

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Subject Index

Page

Admission of service 27

Argument 9

Assignees for the benefit of creditors are answerable in summary proceedngs 9

Trustees cannot relieve themselves of liability under a trust agreement by an attempt to avoid the obligation of the trust 10

A summary proceeding may be invoked to ascertain the facts and to prevent the perpetration of a fraud 17

The findings of the Referee must be sustained 18

The opinion of the United States Circuit Court of Appeals is not supported by the evidence 22

Respondents can comply with the summary order of the Referee in Bankruptcy 25

Conclusion 25

Questions involved 8

Statement of the case 2

Proceedings before Referee and Court 5

Table of Cases Cited

Pages

Andre, In re, 135 Fed. 736, 13 Am. B. R. 132, 68 C. C. A. 374 14

Bemmerly v. Woodward, 124 Cal. 568 10
Bermingham v. Wilcox, 126 Cal. 467 12
Briskman, In re, 132 Fed. 201, 13 Am. B. R. 57 15
Bryan v. Bernheimer, 181 U. S. 188, 5 Am. B. R. 623 17
Burns v. Clark, 133 Cal. 634 15

Calmon v. Sarraille, 152 Cal. 638 12

Davis v. Schwartz, 155 U. S. 631, 15 Sup. Ct. 237 19

Eddy, Matter of, 48 Am. B. R. 607 15
Ellis Bros. Printing Co., 156 Fed. 430, 19 Am. B. R. 473 .. 14
Epstein v. Steinfeld, 210 Fed. 236, 32 Am. B. R. 6 19

Fuller, in the matter of Edward M. & Co., 2 Am. B. R. N. S., 149 25

Kiewert & Co. v. Juneau, 78 Fed. 708 19

Loving, Matter of, 224 U. S. 183, 27 Am. B. R. 852 19

Mueller v. Nugent, 184 U. S. 1, 7 Am. B. R. 224 ... 10, 13, 15, 16
Miner, In re, 117 Fed. 953, 9 Am. B. R. 100 20

New York Car Wheel Works, In re, 132 Fed. 203, 14 Am. B. R. 595 15

Purvine, In re, 96 Fed. 192, 2 Am. B. R. 787 13

Rathman, In re, 183 Fed. 913, 25 Am. B. R. 246 9
Rider, In re, 96 Fed. 811, 3 Am. B. R. 192 20
Ripon Knitting Works v. Schrieber, 101 Fed. 810, Am. B. R. 299 13
Rosser, In re, 101 Fed. 562, 4 Am. B. R. 153 13

Schlessinger, In re, 102 Fed. 117, 4 Am. B. R. 361 14
Schweer v. Brown, 130 Fed. 328, 12 Am. B. R. 179, Affd. 195 U. S. 171, 12 Am. B. R. 673 13

Page

Stern, In the Matter of, 215 Fed. 979, 32 Am. B. R. 281.. 14
Stout, In re, 109 Fed. 794, 6 Am. B. R. 505..... 20
Stuart v. Reynolds, 204 Fed. 709, 29 Am. B. R. 412..... 18
Swift, in re, 118 Fed. 348, 9 Am. B. R. 237..... 20

Thompson, In re, 128 Fed. 575, 11 Am. B. R. 719..... 17
Tilghman v. Proctor, 125 U. S. 137, 8 Sup. Ct. 894..... 19
Tug River Co. v. Brigel, 86 Fed. 818, 30 C. C. A. 415..... 19

Watts and Sachs, In re, 190 U. S. 1, 10 Am. B. R. 113... 10
Waxelbaum, In re, 101 Fed. 228, 4 Am. B. R. 120..... 20
White v. Schloerb, 178 U. S. 542, 4 Am. B. R. 178..... 10
Wickersham v. Crittenden, 93 Cal. 17..... 17

CODE SECTIONS.

Civil Code of California:

Sec. 2229..... 12
Sec. 2231..... 17
Sec. 2237..... 12
Sec. 2251..... 11
Sec. 2258..... 10
Sec. 2279..... 11

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BRIEF FOR PETITIONER.

The application of A. L. May, trustee in bankruptcy, for a writ of certiorari having been granted, petitioner herein now presents to this court for consideration the points and authorities upon which he relies.

The following is a brief statement of the facts which we submit supports the contention of the trustee in bankruptcy that a summary order is proper and should be enforced.

Statement of the Case.

The Geo. W. Cowen Co., Inc., bankrupt herein, conducted a ladies' ready to wear department store at Sacramento, California. It had a bank account with the Fort Sutter National Bank, since taken over, or succeeded by the Sacramento-San Joaquin Bank.

The company had become indebted to the bank in the sum of $15,000, for which obligation it had on January 9, 1920, executed its promissory note.

J. M. Henderson, Jr., was the president and manager of the bank and in control of all its business transactions. He was also the president of the Sacramento-San Joaquin Bank, in fact, one of the principal stockholders. (Tr. Rec. p. 93.)

In September of 1920, Geo. W. Cowen, the president and manager of the bankrupt corporation, finding the corporation financially embarrassed, consulted with Mr. Henderson. As a result of this and subsequent conferences an agreement of trusteeship was entered into on the 15th day of September, 1920, between the Geo. W. Cowen Co., Inc., a corporation, said bankrupt, and said J. M. Henderson,

Jr., and T. J. Scannell, whereby said Henderson and Scannell were appointed assignees for the benefit of creditors.

The agreement was properly executed; the assignees assumed immediate control, and the bankrupt corporation ceased from that moment to function as a business concern. Several meetings of all parties in interest were held at the office of the company immediately after the execution of this agreement. At these meetings both of the assignees —as well as the principal officers of the corporation— were present. (It must be borne in mind throughout that J. M. Henderson, Jr., one of the assignees, was likewise president of and in authority of the creditor bank.)

A record was kept of the minutes of these meetings, which records show that at the meeting held September 24, 1920, nine days after the execution of the assignment to J. M. Henderson, Jr., and T. J. Scannell, a resolution was regularly adopted providing that all checks should be signed only by J. M. Henderson, Jr., and T. J. Scannell, Trustees. (Tr. Rec. pp. 155-156.)

That this was actually done and the bank instructed to honor checks only upon these signatures is conclusively shown by the records of the Fort Sutter National Bank and its successor Sacramento-San Joaquin Bank. On September 24, 1920, the account of the Geo. W. Cowen Co., Inc., was closed at the bank. (Tr. Rec. pp. 85, 94, 95,

112, 158.) *On the same day a new account in the name of J. M. Henderson, Jr., and T. J. Scannell, Trustees, Geo. W. Cowen Co., Inc.,* was opened in the same bank, and thereafter all funds derived from the operation of the business or which came into the hands of the Assignees as such were deposited in bank to the credit of *J. M. Henderson, Jr., and T. J. Scannell, Trustees, Geo. W. Cowen, Co., Inc.* Checks were properly drawn and signed as provided for in the resolution of September 24, 1920, and only those checks so signed were honored by the bank. All of the checks and vouchers were introduced in evidence at the time of the hearing before the referee in bankruptcy, and this fact stands uncontradicted.

Some months after the filing of the petition in bankruptcy and the adjudication of the bankrupt, J. M. Henderson, Jr., in an attempt to prevent the trustee in bankruptcy from reaching this fund, personally instructed the employees of the bank to destroy the records of the Assignees' account, and under his express instructions these records were destroyed. (Tr. Rec. pp. 112, 113, 114, 118.) The deposits, however, were at all times made in bank to the credit of the account of J. M. Henderson, Jr., and T. J. Scannell, Trustees, Geo. W. Cowen Co., Inc., which deposits even after the filing of the petition in bankruptcy on October 12, 1920, and up to the appointment of a receiver on November 4, 1920, had been made in this man-

ner. (Tr. Rec. p. 119.) Not only does the evidence disclose that J. M. Henderson, Jr., instructed a young man, one of the bookkeepers of the bank, to destroy the records, but we have the personal admission of Mr. Henderson that he so instructed this young man. (Tr. Rec. pp. 112, 113, 114-118.)

The claim of respondents that the sum of $12,883.81, deposited by the assignees, was applied by the bank in liquidation of a $15,000 note due from the bankrupt to the bank is not sustained by the evidence before the referee, but to the contrary the finding is adverse to this contention, the court holding that this transaction was but a subterfuge on the part of the respondent Henderson to prevent the trustee in bankruptcy from reaching the same. (Tr. Rec. pp. 115-117, 119-123; see also answer, Tr. Rec. p. 40.)

PROCEEDINGS BEFORE REFEREE AND COURT.

A. L. May, petitioner herein, after proceedings duly and regularly had, was on the 15th day of December, 1920, appointed trustee in bankruptcy of Geo. W. Cowen Co., Inc., bankrupt, and thereafter qualified as such. Immediately thereafter demand was made by the trustee upon J. M. Henderson, Jr., and T. J. Scannell, as assignees, for the said sum of $12,883.81. Upon their refusal to pay over this money, an application was filed by said A. L. May as trustee asking for a summary

order directing the said assignees to account for and turn over to him as trustee in bankruptcy the funds in question.

An order to show cause was issued, and answer was made by Messrs. Henderson and Scannell denying that the assignment in trust had ever become effective, or that they or either of them had acted as trustee; that Scannell had acted as manager of the bankrupt's business, had deposited moneys received from the sales with the Fort Sutter National Bank of Sacramento, and had checked against the deposit to pay current expenses, and that the amount deposited exceeded the withdrawals by $12,883.81. The further defense was set up that the said Fort Sutter National Bank and its successor in interest, the Sacramento-San Joaquin Bank, then held said sum and claimed said moneys as a partial setoff to a note of the bankrupt for $15,000, and that the claim of the bank was made in good faith. The answer further alleged that Henderson and Scannell were without the legal right or power to demand or retake the moneys, and that the referee, under the circumstances, had no jurisdiction to compel them to pay the money to the trustee in bankruptcy. (Tr. pp. 34-41, inclusive.)

A hearing was had upon the issues raised, and the referee held that the claim of said J. M. Henderson, Jr., and T. J. Scannell that the foregoing funds were no longer under their control *was not made in good faith,* but that there was then in the

hands of J. M. Henderson, Jr., and T. J. Scannell the sum of $12,883.81 belonging to the bankrupt's estate (Tr. p. 61), and directed said Henderson and Scannell to pay over to the trustee in bankruptcy herein the aforesaid sum of $12,883.81 within fifteen days from the date of said order. (Tr. pp. 43-45.)

Within the time required by the statute a petition for review of the order of the referee was filed (Tr. pp. 45-47, inclusive), and after consideration by the District Court an order was entered by the latter affirming the order of the referee directing payment to the trustee herein of the aforesaid sum of $12,883.81. (Tr. Rec. p. 7.)

Thereupon, the respondents took an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and at the same time filed a petition for revision of the order of said District Court, the matter being presented to said Court of Appeals, under stipulation, in one transcript (Tr. Rec. pp. 11-12). Subsequently the said United States Circuit Court of Appeals filed its opinion in pursuance of which a judgment was entered dismissing the said appeal and reversing the order of the said District Court on the said petition for revision. (Tr. Rec. pp. 227-228.)

A petition for rehearing was then filed by the trustee and denied by the said Circuit Court of Appeals. (Tr. Rec. p. 229.)

Thereupon, application for a writ of certiorari was filed in this court, and on October 15, 1923,

an order was entered by your honorable court granting the application of A. L. May, trustee in bankruptcy, for the issuance of such writ of certiorari, and this matter is now properly presented to this court for due consideration upon the merits, that is, whether the referee in bankruptcy had authority to issue the order requiring J. M. Henderson, Jr., and T. J. Scannell, assignees, to pay to the trustee in bankruptcy the sum of $12,883.81.

Questions Involved.

The questions now presented to this court for consideration are as follows:

(1) *Can duly and regularly appointed assignees for the benefit of creditors evade the consequences of a summary proceeding and deprive a court in bankruptcy of jurisdiction when it appears that the assignment was made within four months prior to the order of adjudication, and that funds received by such assignees were deposited in bank in a trust fund in their joint names as trustees, and have never been withdrawn by such assignees?*

(2) *Can the president of a national bank, while acting in a dual capacity as assignee for the benefit of creditors, by destroying and changing the records of the bank, divest himself as assignee of funds belonging to the bankrupt estate?*

(3) *Can assignees for the benefit of creditors take advantage of a wrongful act by the president*

of a bank, to assist such bank in perpetrating a fraud upon the creditors of said bankrupt, thereby divesting themselves, and depriving this court, of control over the funds rightfully in the possession of such assignees?

Argument.

ASSIGNEES FOR THE BENEFIT OF CREDITORS ARE ANSWERABLE IN SUMMARY PROCEEDINGS.

It is clearly established that assignees for the benefit of creditors are answerable to the summary jurisdiction of the bankruptcy court respecting funds in their hands belonging to the bankrupt estate. There are numerous decisions upon this point and the law may well be regarded as settled.

See

In re Rathman (Rathman v. Booth), 25 Am. B. R. 246, at 258, 183 Fed. 913.

"Assignees for the benefit of creditors and receivers for the benefit of creditors in insolvency or in winding-up suits appointed after four months prior to the filing of a petition in bankruptcy are not adverse claimants, but are only representatives of the bankrupt and his unsecured creditors within the meaning of section 23 of the Bankruptcy Law, because they have and claim no lien upon, right to, or interest in the property in themselves, for which they have given a valuable consideration. From them and from others holding the property of the bankrupt for him, including officers of other courts, who replevin or attach it without claim of lien upon, or right to the property in them-

selves, the bankruptcy court may by summary proceeding take the actual possession of the property and then when it has thus acquired the actual possession may by summary proceedings determine the validity of claims or liens upon and titles to it. *Mueller v. Nugent,* 184 U. S. 1, 14, 15, 7 Am. B. R. 224; *In re Watts and Sachs,* 190 U. S. 1, 27, 10 Am. B. R. 113; *White v. Schloerb,* 178 U. S. 542, 545, 546, 4 Am. B. R. 178."

TRUSTEES CANNOT RELIEVE THEMSELVES OF LIABILITY UNDER A TRUST AGREEMENT BY AN ATTEMPT TO AVOID THE OBLIGATION OF THE TRUST.

"A trustee must fulfill the purpose of the trust, as declared at its creation, and must follow all the directions of the trustor given at that time, except as modified by the consent of all parties interested, in the same manner, and to the same extent, as an employee."

Sec. 2258 Civil Code of California.

See also

Bemmerly v. Woodward, 124 Cal. 568, at 572.

"As the administration was left open because of the trust, Woodward was, of course, responsible as trustee, and should have kept the money invested for his beneficiaries."

The respondents here have contended that it was the understanding and intention that the trust created by the assignment agreement should not go into effect until it was consented to by all of the

creditors. No such declaration is found in the instrument, and in fact the creditor bank itself signed the same, setting forth the full amount of its claim of $15,000.

There never was any rescission.

> "The mutual consent of a trustor and trustee creates a trust of which the beneficiary may take advantage at any time prior to its rescission."
>
> Sec. 2251 Civil Code of California.

The trusteeship then, having gone into effect, could only be dissolved either by the fulfillment of its object or by such object becoming impossible or unlawful.

> "A trust is extinguished by the entire fulfillment of its object, or by such object becoming impossible or unlawful."
>
> Sec. 2279 Civil Code of California.

Thus it will be noted that J. M. Henderson, Jr., having been directed and empowered by all of the parties in interest to direct and control the funds of the Geo. W. Cowen Co., and having clothed himself with this authority, and having actually come into possession of all of these funds, cannot now claim that the trust did not become effective, thereby releasing himself of responsibility, but, on the contrary, he must personally account for all moneys which since the 15th day of September, 1920, have come into his possession.

> "A trustee who uses or disposes of the trust property, contrary to section two thousand two

hundred and twenty-nine, may, at the option of the beneficiary, be required to account for all profits so made, or to pay the value of its use, and, if he has disposed thereof, to replace it, with its fruits, or to account for its proceeds, with interest."

Sec. 2237 Civil Code of California.

"A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner."

Sec. 2229 Civil Code of California.

See

Bermingham v. Wilcox, 120 Cal. 467, at 472.

"It was not necessary that there should have been an express agreement between them for a division of the management of the estate in order that one should be liable for the acts of the other. 'Where an executor by his negligence suffers his coexecutor to receive and waste the estate, when he has the means of preventing it by proper care, he is liable to the beneficiaries under the will for the estate thus wasted.' (Adair v. Brimmer, 74 N. Y. 539.)"

See also

Burns v. Clark, 133 Cal. 634;

Calmon v. Sarraille, 142 Cal. 638.

The respondents assume that a mere denial on their part that the funds in question are under their control is sufficient to divest the referee of the right to inquire into the facts respecting such contention, thus relegating the trustee to the filing of a plenary suit. This we do not understand to be the law.

otherwise it would nullify the force and effect of summary proceedings. It would deprive the bankruptcy court, through its referee, of exercising control of the funds properly belonging to the bankrupt estate, and might through long and tedious litigation prevent the recovery of such property. It is the function of the referee in bankruptcy in summary proceedings to inquire into the merits of a so-called adverse claim to the extent that if it shall be determined that funds or property are either in the possession or under the control of a respondent, and that adverse claim thereto is not made in good faith, or is false or fraudulent, or merely colorable, to find the same without valid foundation and the trustee entitled to the relief demanded.

The cases supporting this principle are numerous.

The case of

> *Schweer v. Brown*, 12 Am. B. R. 179, 130 Fed. 328, affd. 195 U. S. 171, 12 Am. B. R. 673,

subsequently affirmed by the Supreme Court, says:

> "The adjudication in bankruptcy operated to transfer to the trustee the title to all of the property of the bankrupt which was subject to distribution among his creditors. His obligation and his duty to surrender to the trustee property in his possession which belongs to the trustee, and not to him, cannot be converted into a debt, at his option, by his mere refusal to comply with the order of the court. *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224; *In re Purvine*, 2 Am. B. R. 787, 96 Fed. 192; *In re Rosser*, 4 Am. B. R. 153, 101 Fed. 562; *Ripon*

Knitting Works v. Schrieber, (D. C.), 4 Am. B. R. 299, 101 Fed. 810; Id. 104 Fed. 1006; *In re Schlesinger,* 4 Am. B. R. 361, 102 Fed. 117. These cases also furnish a conclusive answer to the claim of the bankrupt that his mere denial under oath of the possession of assets is conclusive, and that in such case the only remedy of the trustee and the creditors is by proceedings under the penal sections of the Bankrupt Act."

In the Matter of Stern, 32 Am. B. R. 281, at p. 283, 215 Fed. 979,

the court says:

"The mere denial of the bankrupt is by no means controlling."

In

Ellis Bros. Printing Co., 19 Am. B. R. 473, 156 Fed. 430,

it is said:

"Upon the authorities cited in the report of the master, the bankruptcy court has power to inquire into the facts for the purpose of determining whether any basis exists for the adverse claim of title to the property asserted by the respondent. The mere assertion of an adverse claim of title, even with an intention to protect it by the usual process of law, will not preclude the bankruptcy court from exercising its power to proceed summarily. *In re Andre,* 13 Am. B. R. 132, 135 Fed. 736, 68 C. C. A. 374. It is only when the evidence indicates that the asserted claim is not false or fraudulent that the bankruptcy court is deprived of jurisdiction. If it should appear from the proofs that the respondent, Strong, refuses to surrender the money collected by him to the trustee

simply on the ground that the title to the same is conclusively evidenced by his possession of it, or if the claim is unreal or colorable, then it is the duty of this court to direct its payment to the trustee. This principle of law is so clearly and definitely stated by the Supreme Court in *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224, 22 Sup. Ct. 269, 46 L. Ed. 405, that no other citations are thought necessary.

In the prior cases decided by this court, in passing upon the right to exercise summary jurisdiction, it was not intended to be understood as holding that, irrespective of whether the elicited facts were sufficient in law, the mere assertion of an adverse claim of title or ownership deprived the court of summary power. If the proofs show that in fact there is no legal basis for the asserted adverse claim, the summary power of the court is not defeated."

In *Matter of Eddy*, 48 Am. B. R. 607, at page 609:

"The corporation has the right to assert that it is in rightful possession and an adverse claimant thereto. Such a determination cannot be made in view of the categorical denial by the bankrupt that the transfer was in bad faith. See *In re Briskman* (D. C., N. Y.), 13 Am. B. R. 57, 132 Fed. 201; *In re New York Car Wheel Works* (D. C., N. Y.), 14 Am. B. R. 595, 132 Fed. 203. There must be inquiry into the merits of such a controversy. It cannot here be determined on opposing affidavits. If in the judgment of the court the asserted adverse claim is colorable and in bad faith, a surrender of possession may be required summarily."

Probably the most important case settling conclusively the control of the bankruptcy court over all assets of a bankrupt from the date of the filing of the petition in bankruptcy is the case of

Mueller v. Nugent, 7 Am. B. R. 234, 184 U. S. 1.

Honorable Chief Justice Fuller, in delivering the opinion, says:

> "Does a mere refusal by the bankrupt or his agent so to deliver up oblige the trustee to resort to a plenary suit in the Circuit Court or a State Court, as the case may be?
>
> If it be so, the grant of jurisdiction to cause the estates of bankrupts to be collected, and to determine controversies relating thereto, would be seriously impaired, and, in many respects, rendered practically inefficient.
>
> The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication, and expense, intended to be avoided by the simpler methods of the Bankrupt Law.
>
> It is as true of the present law as it was of that of 1867, that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction. Bank v. Sherman, 101 U. S. 407; and on adjudication, title to the bankrupt's property became vested in the trustee, secs. 70, 21e, with actual or constructive possession, and placed in the custody of the bankruptcy court."

A SUMMARY PROCEEDING MAY BE INVOKED TO ASCERTAIN THE TRUE FACTS AND TO PREVENT THE PERPETRATION OF A FRAUD.

"A trustee may not use the influence which his position gives him to obtain any advantage from his beneficiary."

Sec. 2231 Civil Code of California.

Such transactions are regarded as against public policy.

Wickersham v. Crittenden, 93 Cal. 17, 28-9.

"It is one of the peculiar functions of a court of equity to protect a *cestui que* trust against any violation by his trustee of his obligation, and to prevent any impairment of the trust fund, and in case of diversion or misappropriation of such fund by the trustee, to direct a restitution thereof, and to enforce such direction by some process appropriate to the exercise of its jurisdiction."

In the case of

In re Thompson, 11 Am. B. Rep. 719, 128 Fed. 575,

decided by the United States Circuit Court of Appeals of the Second Circuit, we find the following language:

"It is manifest that the court had jurisdiction to compel the assignee under the void state assignment to render an account. *Bryan v. Bernheimer*, 181 U. S. 188, 5 Am. B. R. 623, 45 L. Ed. 814. This proposition is not disputed. The petitioner, Murray, recognizing the authority of the court, appeared voluntarily before the referee, presented his account and gave testimony regarding it. Having once acquired jurisdiction of the proceeding, the

court did not lose it because the investigation took a wider range than the assignee expected or intended. His present contention, carried to its logical conclusion, is that the court acquired jurisdiction of those items which he chose to admit, but not to those which he chose to dispute, and that this jurisdiction was lost the moment he asserted a claim of title in his individual capacity. If this contention were sustained an assignee for the benefit of creditors could, by the mere assertion of a colorable claim, paralyze the arm of the court of bankruptcy and defeat the intent and purpose of the law."

THE FINDINGS OF THE REFEREE MUST BE SUSTAINED.

The summary order having been made by the referee in bankruptcy in accordance with the findings of fact, supported by the evidence, cannot now be disturbed. This principle of law has been sustained in numerous cases, and we content ourselves with citations from two of the leading cases. It is clearly stated by Mr. Justice Meek of the United States Circuit Court of Appeals, Fifth Circuit, in the case of

Stuart v. Reynolds (In re Reynolds), 29 Am. B. R. 412, at p. 415, 204 Fed. 709:

"This proceeding is brought here under the provisions of Section 24-b of the Bankruptcy Act. Therefore, we are not authorized to determine questions of fact upon which the order of the lower court is based, but may only superintend, and, if need be, revise its action in the matter of law. This is now the settled

interpretation given Sec. 24-b. *Matter of Loving*, 224 U. S. 183, 27 Am. B. R. 852" and other cases.

To the same point is

Epstein v. Steinfeld, 32 Am. B. R. 6, at 7, 210 Fed. 236.

The opinion of the U. S. Circuit Court of Appeals, Third Circuit, in that case states:

"The findings of the referee were made by him after he had taken a large amount of conflicting testimony covering every phase of the alleged withholding of property by the bankrupt, and when he had the opportunity to and did see the witness who testified. His findings, as has been decided over and over again, ought not to be disturbed except where it is demonstrated that a plain mistake has been made. This rule is so forcibly stated in Ohio Valley Bank Co. v. Mack (C. C. A. 6th Cir.) 20 Am. B. R. 40, 163 Fed. 155, 89 C. C. A. 605, 24 L. R. A. (N. S.) 184, by Judge Lurton, that we quote it at some length:

'No arbitrary rule can be laid down for determining the weight which should be attached to a finding of fact by a bankrupt referee. His position and duties are analogous, however, to those of a special master directed to take evidence and report his conclusions, and the rule applicable to a review of a referee's findings of fact must be substantially that applicable to a master's report. *Tilghman v. Proctor*, 125 U. S. 137, 8 Sup. Ct. 894, 31 L. Ed. 664; *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289; *Emil Kiewert & Co. v. Juneau*, 78 Fed. 708, 24 C. C. A. 294; *Tug River Co. v. Brigel*, 86 Fed. 818, 30 C. C. A. 415. Much in both cases must depend upon the character of

> the finding. If it be a deduction from established fact, the finding would not carry any great weight, for the judge, having the same facts, may as well draw inferences or deduce a conclusion as the referee. But if the finding is based upon conflicting evidence involving questions of credibility, and the referee has heard the witnesses, much greater weight naturally attaches to his conclusion, and the weight of authority is that the district judge, while scrutinizing with care his conclusions upon review, should not disturb his findings unless there is most cogent evidence of a mistake and miscarriage of justice. *Loveland on Bankruptcy*, section 32a; *In re Swift* (D. C., Mass.), 9 Am. B. R. 237, 118 Fed. 348; *In re Rider*, (D. C., N. Y.), 3 Am. B. R. 192, 96 Fed. 811; *In re Waxelbaum* (D. C., Ga.), 4 Am. B. R. 120, 101 Fed. 228; *In re Stout* (D. C., Mo.), 6 Am. B. R. 505, 109 Fed. 794; *In re Miner* (D. C. Ore.), 9 Am. B. R. 100, 117 Fed. 953. In this case the conclusions of the referee necessarily involved the credibility of the witnesses who testified to the *bona fides* of the claim preferred by Charles Mack, Sr. The conclusion he reached in favor of the validity of his debt has also passed the scrutiny of the district judge. Under such circumstances, this court is not warranted in overturning the conclusions of two courts upon anything less than a demonstration of plain mistake'."

It must be remembered that the trustee in bankruptcy was able to prove his case by the testimony of adverse witnesses, and that it was not without some considerable effort that the facts were established. Furthermore, it should be remembered that the referee in bankruptcy who sat at the various

hearings was in a position to judge not only as to the character of the testimony, but the general demeanor of the witnesses examined, and when he found that there was a fraudulent destruction of the records and concluded that the funds of the assignees were still under their control, the findings should not be disturbed.

The findings of the referee are amply supported, and we wish to call particular attention to the following contained in the referee's certificate (Tr. p. 54):

> *"The account in the Fort Sutter National Bank from and after that date was under the control absolutely of J. M. Henderson, Jr., who at all times was intimately advised and informed of the various transactions relating to the account."*

Again the referee finds the following which likewise we submit is amply supported by the evidence introduced in this case:

> "Finally, it is claimed on behalf of respondents that the Fort Sutter National Bank is not a party to the proceeding now before the referee, and that the claim of the trustee, if any, is a matter of a plenary action against the Fort Sutter National Bank. I cannot agree with this contention. Summing up the testimony of all the witnesses it conclusively appears that J. M. Henderson, Jr., as president of the Fort Sutter National Bank, at all times had and still has personal control of these funds. It is unquestionably true that a bank is custodian of money, and as such must recognize

the authorization or signature of the party in whose name the deposit is held by the bank. The bank cannot of its own accord change or transfer this account without the direct instructions of its depositor, and as J. M. Henderson, Jr., and T. J. Scannell were trustees under an express trust agreement entered into by them under their own signatures, which agreement was also consented to in writing by the bank, I must conclude that the bank had actual knowledge of all of the transactions, and having this knowledge could not, even though instructed by its president, transfer the account to others without the consent of the beneficiaries under the trust agreement. *I find further that J. M. Henderson, Jr., was the only officer in charge of the bank who at any time exerted any control over this account.*

For the foregoing reasons the referee finds that the claim of J. M. Henderson, Jr., and T. J. Scannell that the funds are no longer under their control is not made in good faith, but that there is now in the hands of J. M. Henderson, Jr., and T. J. Scannell the sum of $12,883.81, which should be paid to A. L. May, said trustee in bankruptcy."

THE OPINION OF THE U. S. CIRCUIT COURT OF APPEALS IS NOT SUPPORTED BY THE EVIDENCE.

Without undue criticism of the opinion of the esteemed justices of the United States Circuit Court of Appeals for the Ninth Circuit, we are constrained to believe that they have made deductions which are not in accord with the facts found by the referee in bankruptcy, and are in direct contradiction of the

evidence upon which such findings were based. We call attention to the following statement in the opinion:

> "It is conceded that the money is now in the custody of the bank and under its control; it is likewise conceded that the respondents have no deposit account in the bank, and we find nothing in the record which justifies the conclusion that the bank holds the money as a mere agent of the respondents, or in any other capacity, or for any other purpose than that stated in the answer. In other words, we find nothing in the record to impeach the claim of the respondents that the bank claims the money by title adverse to them, and that the money is not now in their possession or under their control." (Tr. Rec. 226.)

The following facts incorporated into the findings of the referee are to the contrary:

> "It is unquestionably true that a bank is custodian of money, and as such must recognize the authorization or signature of the party in whose name the deposit is held by the bank. The bank cannot of its own accord change or transfer this account without the direct instructions of its depositor." * * *. (Tr. Rec., pp. 60, 61.)

In order to reach the conclusion that the fund in question is beyond the control of the assignees, our learned justices, after deciding that

> "the money passed into the possession and under the control of the bank, and out of the

> possession and beyond the control of the respondents,"

declare,

> "To hold otherwise is to hold that entries in the books of a national bank are mere formalities, and may be changed at will."
> (Tr. Rec. pp. 225, 226.)

We have no quarrel with this latter statement but believe that such construction of the law must likewise establish the claim that the bank as a national institution could not falsify its records. The instructions by its president to destroy original ledger sheets and substitute in lieu thereof a different statement can serve no purpose. There can be no claim made, nor has there been any showing, that the bank was an innocent party and had no knowledge of the transaction, and although the bank at this time is not a party to the proceedings, due consideration must be given to the true facts so that the scheme of fraud evolved in the mind of J. M. Henderson, Jr., may be fully grasped. For that purpose, we again call to the attention of the court the fact that the assignment or trust agreement entered into on September 15, 1920, between the bankrupt, the assignees, and some of the creditors, did include the Fort Sutter National Bank as a party and a creditor in the sum of fifteen thousand dollars, and bears the signature of the bank. (Tr. Rec. p. 129.)

RESPONDENTS CAN COMPLY WITH THE SUMMARY ORDER OF THE REFEREE IN BANKRUPTCY.

Can it be said that any showing has been made by the respondents that they are unable to comply with the order to show cause, the funds now being beyond their control?

Since the application for the writ of certiorari was filed in this court, the United States Circuit Court of Appeals, for the Second Circuit of New York in November, 1923,

In the Matter of Edward M. Fuller & Co.,
Vol. 2 A. B. R. N. S. 149.

very clearly calls attention to the fact.

> "If a claim rests upon the mere pretense of fact or of law, it is colorable."

And further says:

> "A claim is adverse if the evidence offered has a basis for and is sufficient, if uncontroverted, to establish the validity of the claim."

What can be more in point than the language of this esteemed court, and what can be more clearly established in this case than the attempted claim on the part of the assignees to relieve themselves of responsibility by setting up a fraudulent claim that this fund is no longer in their possession or under their control?

Conclusion.

The Fort Sutter National Bank and the Sacramento-San Joaquin Bank, its successor, can have

no claim adverse to the trustee in bankruptcy. Their own records disclose that they have on deposit this money to the credit of the assignees, and the assignees at no time have issued a check for this balance on deposit. We do know that the assignees have refused not only to assist the trustee in bankruptcy, but admit that they are acting in aid of the bank. The assignees, J. M. Henderson, Jr. and T. J. Seannell should not by a mere statement be permitted to divest themselves of their trust.

We, therefore, submit that the order of the referee in bankruptcy was proper and should be sustained.

Dated, San Francisco,
September 22, 1924.

Respectfully submitted,
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